(35)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL : HYDERABAD BENCH

AT HYDERABAD

O.A. No. 1242/93. Dt. of Decision : 16-8-94.

Mr. S.A. Khasim .. Applicant.

Vs

The Commissioner of Railway Safety,
Ministry of Civil Aviation,
SC Circle, S.D. Road,
Secunderabad - 500 371. .. Respondent.

Counsel for the Applicant : Mr. V.Venkateswara Rao

Counsel for the Respondents: Mr. V.Bhimanna, Addl. CGSC.

CORAM:

THE HON'BLE SHRI JUSTICE V.NEELADRI RAO : VICE CHAIRMAN

THE HON'BLE SHRI R. RANGARAJAN : MEMBER (ADMN.)

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OA.1242/93

Judgement

(As per Hon. Mr. Justice V. Neeladri Rao, Vice Chairman)

Heard Sri V. Venkateswara Rao, learned counsel for the applicant and Sri V. Bhimanna, learned counsel for the respondents.

2. This OA is filed challenging the order No.2/SC/6/III dated 1-10-1993 whereby the applicant was removed from service.

3. The applicant submitted an application to the respondent in March, 1993 seeking appointment in Group-D category. He was interviewed on 19-4-1993 and the applicant alleges that on that day he produced the certificate regarding his educational qualification, date of birth and employment registration card for perusal. By letter dated 4-5-1993, the applicant was again asked to appear in the office of the respondent on 21-5-1993 for interview and accordingly he was interviewed on that day. The respondent issued office order No.2/SC/6/III dated 26-5-1993 and the relevant portion is as under :

"Sri S.A. Khasim, s/o S. Ahmed Ali, who is selected for the post of Peon in scale of Rs.750-12-870-EEB-14-940 (RSRP) is hereby appointed as Peon with effect from 26-5-1993, in an officiating capacity in this office in scale Rs.750-12-870-EB-14-940 as pay Rs.750/- per month plus usual allowances as admissible to Central Government Employees from time to time.

2. His appointment as peon in this office is provisional and temporary, subject to the conditions stipulated

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in this office order No.2/SC/6/III dated 21-5-1993. He will be on probation for a period of two years from the date of his joining.

3. He is medically found 'Fit' for the above appointment vide Medical Certificate No.0081 dated 25-5-1993 issued by the Medical Superintendent, South Central Railway, Lallaguda, Secunderabad."

4. The applicant joined service on the same day i.e. 26-5-1993. In exercise of power under Rule 5(1) of CCS(Temporary Service) Rules, 1965, the respondent issued impugned order dated 1-10-1993 removing the applicant from the service by ordering one month pay and the same was paid to the applicant.

5. The order dated 1-10-1993 terminating the applicant from service is assailed on the following grounds :-

i) It is vitiated as no show-cause-notice was given before the said order was issued.

ii) When no show-cause-notice was issued, the question as to whether any prejudice is caused or not is not a matter for consideration.

iii) Even the earlier appointments were made without issuing a requisition to the Employment Exchange officer.

6. It is submitted for the respondents that ~~on~~ as the appointment of the applicant, is not in accordance with the rules, the applicant was removed from service by ~~re~~ invoking Rule 5(1) CCS(Temporary service)Rules, which does not visualise or envisage issual of a show-cause-notice before dispensing with the service of the temporary employee. ~~urged the learned counsel for the respondent~~.

7. It is manifest from the recruitment rules that the appointment to the post of Grade D in the office of the respondent ~~have~~ has to be made either by Direct recruitment or by transfer. The GI MHA OM No.71/49-DGS dated

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11-12-1949 read with GI MHA OM No.14/11/64-Estt(D) dated 21-3-1964 stipulates that all the vacancies in Central Government Establishement other than those filled through UPSC, SSC, should be notified to the nearest Employment Exchange, and no department or office shall fill any vacancies by direct recruitments unless the non-availability certificate is produced. The group-D is not within the purview of the Staff Selection Commission. As such the direct recruitment to Group-D service in Central Government Establishment ~~had~~ has to be made only from amongst the candidates sponsored from Employment exchange to which necessary requisition had to be issued, and appointment ~~otherwise~~ to Group-D posts by direct recruitment arises only in a case where the non-availability sertificate is issued by the Employment exchange. Though the applicant got his name registered in the Employment exchange, it is not a case where the respondents issued a requisition to the concerned Employment Officer for sponsoring the names for consideration for Group-D posts, and ~~thus~~ thus, it is not a case where the applicant's name was sponsored by the Employment exchange for Group-D posts.

8. The question that arises is ~~that~~ as to, whether the services of an employee who was not appointed in accordance with the Recruitment rules, can be dispensed with by resorting to Rule 5(1) of CCS (Temporary Service) Rules 1965 even without issual of show-cause-notice. 1981 SC 136 (S. L. Kapur vs. Jagmohan) is relied upon by the applicants to urge that it is mandatory to issue show-cause-notice, as the order of termination results

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in civil consequences even when there is no specific provision to that effect. There cannot be any doubt about ~~the applying~~ resulting of civil consequences due to termination of service. In Kapur's case it was held that even administrative action resulting [illegible] becomes void if show-cause-notice is not given, even when there is no specific statutory provision for issual of such show-cause-notice. But in ~~some~~ the same judgements, one exception to the above rules was noted. If the statute is clear ~~that if~~ to the effect that there is ~~it has~~ no right of ~~such~~ self defence, the issual of show-cause-notice is not necessary. The above principle was enunciated by the Privy council in 1967 (2) AC 337 (Alfred Thangarajah Jurayappah vs. W.J. Fernando) and it was referred to with approval in Kapur's case.

9. It is hence, necessary to peruse Rule 5(1) of Temporary Service Rules in ~~aught~~ order to be determined as to whether the ~~statement~~ statute makes it clear that it is not necessary to issue a show-cause-notice before the order of termination is passed ~~therein~~ under. Rule 5(1) is as follows :

(5) Condonation of breaks for purpose of computing three years' service - Under GI MHA OM No.4/49/TS, dated the 11th July, 1949, broken periods of temporary service would not count for purposes of computing three years' service for quasi-permanency unless the breaks are condoned specifically by the Ministry of Home Affairs in consultation with the Ministry of Finance and the service thus rendered continuous. It has now been decided that the Ministries themselves and the Comptroller and Auditor General in respect of persons serving in the Indian Audit and Accounts Department may, in future condone such breaks for the aforesaid purpose, subject to the conditions indicated below :

(i) Only such breaks should be condoned for the purpose of computing three years service for quasi-permanency as were caused by circumstances beyond the individual's control e.g. retrenchment, prolonged illness resulting in termination of service etc.

10. It is evident from the proviso that in lieu of one month notice the notice pay can be given. The one month notice ~~of notice pay~~ or is intended to give sufficient time to the ~~applicant~~ employee to seek alternative termination ~~have~~ has to be made immediately, ~~given notice pay~~ has to be paid ~~immediately~~ so as to sustain himself till he gets alternative job or avocation. It can thereby stated that the above provision is clear to the effect that the temporary employee has no right of self-defence in cases where on the basis of undisputed facts the termination is made. It may be noted that even an order that is passed under Rule 5 is ~~sought~~ subject to the judicial review, and in such case the Court/Tribunals probes into the matter and it is stated ~~that it is~~ as a case of ~~leaving the file~~ lifting the veil for determining as to whether it is an order passed ~~by the~~ bonafide or malafide. Thus, when only one month notice or notice pay is envisaged as per Rule 5(1), it can be reasonably inferred that it does not contemplate issual of show-cause-notice even though termination as per the said order results in the civil consequences. The Legislature contemplated even ~~in cases of~~ immediate termination under the said rule, and as such notice pay was stipulated. ~~It is~~ Where it is a case of issual of show-cause-notice, the question of termination will naturally come into effect from the date of service of order of termination and the question of issual of one month's notice or one month's pay in lieu of ~~that~~ notice does not arise. So, we feel that Rule 5(1) makes it clear that in case of exercise of power

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thereunder there is no need to issue show-cause-notice.

11. The next point which was considered in Kapur's case is as to whether it is necessary for the affected party to prove, ~~produce~~ prejudice, when show-cause-notice was not given before the impugned order was passed. It was held that the very non-issual of show-cause notice in a case where it is necessary, ~~issuing the same~~ is a case of probable unjustice or apparent injustice and hence it is not necessary for the affected person to prove prejudice when the impugned order or action was not preceded by show-cause-notice. But at the same time it was observed at para 17 therein (Kapur's case) that where under the admitted, and undisputed ~~act~~ facts, only one conclusion is possible, and under the law one penalty is permissible, the Court may not issue its writ to compel ~~and~~ observance of natural justice, not because it proves non-observing of natural justice but because Court do not issue ~~factual assessment~~ futile writ.

12. We already observed that Rule 5(1) of CCS (Temporary Service) Rules makes it clear that it is not necessary to issue any show cause notice before an order there under is passed. There cannot be any apprehension of the affected person being ~~sufferred~~ affected on the basis of orders ~~xxxxxx~~ based on malafides, for such orders are liable to be set-aside on ~~the basis of a~~ judicial review. When it is not necessary to issue a show cause notice before invoking Rule 5, the question of the temporary employee having prejudice for want of notice does not arise. Assuming that even in case of orders passed under Rule 5, issual of a show cause notice is necessary, it has to be considered as to whether on the basis of admitted or undisputable facts, whether the only order that can be passed is one of termination as is done by the respondent herein or whether any other order can be passed, for court/Tribunal ~~do~~ does not issue futile orders.

13. There is no dispute in regard to the facts. It is already noticed that the appointment of the applicant to Group 'D' post is not in accordance with the statutory rules. Time and again, the Supreme Court observed that appointments through back door have to be depricated. Further, an employee cannot claim regularisation, if his service is not in accordance with the statutory rules.

14. The learned counsel for the applicant submitted that as his name was registered in the Employment Exchange and as earlier appointments to Group 'D' posts in the office of the respondent were made without reference to the Employment Exchange, the applicant could have

represented ~~as~~ against the order of termination, if a show cause notice was issued to him. It may be noted that while the order appointing the applicant was passed in May 1993 by the then Commissioner of Railway Safety, the impugned order of termination was passed by his successor. It is made now clear by the Supreme Court that Article 14 of the Constitution cannot be invoked ~~by any one~~ to claim parity with a person who got the benefit which is not in accordance with the statutory rules. When the appointment is not in accordance with the statutory rules and when that appointment was set-aside by the successor officer on the ground that the appointment is not in accordance with the statutory rules, and when once that order of successor is legal or valid, the same cannot be set-aside by the court/Tribunal merely on the ground that earlier some appointments were made dehors rules. Thus, when on the basis of the admitted facts, the only order that can be passed is the order as ~~was~~ passed by the respondent, no writ will be issued for quashing the same as it will be futile, even assuming that as per Rule 5 of CCS (Temporary Service) Rules, a show cause notice has to be issued before passing the order of termination under the said rule, on the ground that no show cause notice was issued.

15. The contention that Rule 5(1) of CCS (Temporary Service) Rules is unconstitutional was repelled by the Supreme Court in AIR 1964 SC 1854 (Champaklal Chimanlal Shah Vs. The Union of India). The principle of last

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come, first go applies only in case of retrenchment and not in case where service of a temporary employee was terminated ~~and where such termination is warranted~~ otherwise than by retrenchment as held by the Supreme Court in 1991(1) SLR 606 (State of Uttar Pradesh and another Vs. Kaushal Kishore Shukla). Thus, it cannot be stated that Rule 5(1) of CCS (Temporary Service) Rules can be invoked only in case of retrenchment as it is normally understood.

16. The Supreme Court considered in 1983 SCC(L&S) 303 (Ajit Singh and others Vs. State of Punjab and another) about a case of abrupt en bloc termination of temporary employees in a Trust soon after their earning an increment and the said termination was held as arbitrary and discriminatory as it is a case of reconstitution of the Trust shortly thereafter. It was observed therein that even though terms of employment envisage such termination, court can interfere if such termination is held arbitrary and discriminatory. But this is not a case of arbitrary exercise of power in terminating the services of the applicant.

17. Even 1989(3) SLR 303 (Anil Jayantilal Vyas Vs. Union of India and others) relied upon for the applicant does not support his case. Therein, it was held that even though it was noticed that the applicant secured only 42% instead of 73.86% as noted earlier, the appointment cannot be held as illegal, for it is neither a

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case where the employee therein committed fraud nor a case where the applicant would be ineligible when he got only 42%. On the other hand, it cannot be stated there from that the ~~Bench~~ Court would have upheld termination if the applicant therein was ineligible for appointment on the basis of total marks obtained by him, for it would be a case of appointment which is not in consonance

18. The judgment of Jabalpur Bench of Central Administrative Tribunal reported in 1989(2) SLR 767 (Ku.Usha Tiwari Vs. General Manager, Ordnance Factory, Itarsi) was also cited for the applicant. Therein, the termination of services of the applicant was set-aside on the ground that prior notice of hearing was not given. The Jabalpur Bench had not laid down that in all cases where Rule 5 of CCS (Temporary Service) Rules is invoked, it is necessary to issue a show cause notice. It has to be held that in view of the facts in the said case, it was held that the termination under Rule 5 of CCS (Temporary Service) Rules without issual of prior notice was not justified.

19. Even the judgment of the Supreme Court reported in 1980(2) SLR 26 (Uma Shankar Sharma Vs. The Union of India and others) is not helpful to the applicant. Therein, the question which had come up for consideration before the Supreme Court is as to whether a candidate who was

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selected for representing University could not actually participate in the said event for reasons beyond his control ie., he fell ill, ~~he~~ is eligible for the posts reserved for Sportsmen quota ie., for those who participated in the event referred to on behalf of the University. The Supreme Court held that the intent and ~~the~~ object in providing quota for those who participated in the sports referred to is to give encouragement for those who are talented, and the fact that the applicant ~~xxxxxxx~~ therein was selected for representing the University in the event referred to indicates that he was sufficiently talented, and hence he was also eligible under the said quota and as such cancellation of his appointment under that quota is held as illegal. But therein also it is not stated that cancellation of appointment ~~or termination of appointment~~ on the ground that it is violative of statutory rules can also be set-aside.

20. The Supreme Court held in SCSLR 1950-1994(Vol.I) page-100 (Jagdish Mitter Vs. The Union of India) that even in the order of termination, it is mentioned that the said employee has been found undesirable to be retained in service. It ~~attracts~~ attaches stigma to the said Government servant and thus it amounts to an order of dismissal and hence Article 311(2) of the Constitution is attracted and such an order of termination or discharge without inquiry

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as contemplated under Art. 311(2) is not valid. But, in this case, the order of termination does not refer to any thing which even remotely indicates stigma. Thus, it is not a case of dismissal.

21. It is also contended that Rule 5(1) of CCS (Temporary Service) Rules can be invoked only in case termination or discharge is warranted on the ground of non suitability or unfitness. But, the learned counsel for the applicant had not referred to any decision to support the said contention. Further, even explanation (viii)(b) under Rule 11 of CCS (CCA) Rules states that the termination of service of a temporary Government servant has to be in accordance with the rule 5(1) of CCS (Temporary Service) Rules. Ofcourse, if it is a case of dismissal even of a temporary Government servant, it should be in accordance with the Rule 14 of the CCS (CCA) Rules as Article 311(2) of the Constitution contemplates inquiry in case where the authority intends to dismiss the employee from service. Moreover, Rule 5(1) of CCS (Temporary Service) Rules is beneficial as it envisages notice pay in case of immediate termination. Rule 5(1) does not refer to the circumstances under which termination can be ordered under the said Rule. Hence, it is not just and proper to read into some thing which is not in the rule. We feel that Rule 5 of CCS

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(Temporary Service) Rules is ~~void and apprehensive~~ wide in its ambit ~~is~~ termination of a temporary employees who ~~are~~ is not employed in accordance with the rules.

22. In the result, the OA fails and accordingly it is dismissed. No costs.

(R.RANGARAJAN)
MEMBER(ADMN.)

(V.NEELADRI RAO)
VICE CHAIRMAN

DATED: 16th August, 1994.
Open court dictation.

vsn

Dy.Registrar(Judl)

Copy to:-

1. The Commissioner of Railway Safety, Ministry of Civil Aviation, S.C.Circle, S.D.Road, Secunderabad-500 371.
2. One copy to Mr.V.Venkateswara Rao, Advocate, CAT.Hyd.
3. One copy to Mr.V.Bhimanna, Addl.CGSC, CAT.Hyderabad.
4. Copy to All Reporters as per standard list of C.A.T.
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6. One spare.

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Roved 6/9/94 at 5.00 P.M.

O.A. 1242/93

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH AT HYDERABAD

THE HON'BLE MR.JUSTICE V.NEELADRI RAO
VICE-CHAIRMAN

AND

THE HON'BLE MR.R.RANGARAJAN : M(ADMN)

DATED: 16-8-1994

~~ORDER~~/JUDGMENT

~~M.A.No./R.A/C.A.No.~~

in

O.A.No. 1242/93

~~(T.A.No.~~ ~~(W.P.NO~~)

Admitted and Interim directions
Issued.

Allowed.

Disposed of with directions.

Dismissed.

Dismissed as withdrawn

Dismissed for Default.

Ordered/Rejected

No order as to costs.

pvm